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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1055

R.P.R. CONSTRUCTION COMPANY,
AN ARIZONA CORPORATION,
Petitioner

vs.

BUSHMAN CONSTRUCTION COMPANY,
A MISSOURI CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled matter on October 5, 1965.

REFERENCE TO OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, dated May 5, 1964, printed in Appendix A hereto (unreported).

The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix B hereto, reported as *Bushman Construction Company v. Conner*, 351 F.2d 681 (1965).

The opinion of the United States Court of Appeals for the Tenth Circuit Printed in Appendix C hereto, in a companion case reported as *Bushman Construction Co. v. Air Force Academy Housing, Inc.*, 327 F.2d 481 (1964).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, sought to be reviewed is dated October 5, 1965. Petition for rehearing was filed on October 22, 1965, and was denied November 24, 1965. The jurisdiction of this Court is invoked under U.S. Sup. Ct. Rule 19,1(b), 28 U.S.C.A., to wit: "1.(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

QUESTIONS PRESENTED FOR REVIEW

1. A contracts with B. B later enters into a secret joint venture agreement with C, B and C to share the profits from B's contract with A, C to finance B and be an indemnitor on B's bond to A. C had nothing to do with the making of B's contract with A. A's only knowledge of C is that C is the indemnitor on B's bond. A pays B in full under the contract. Can C be declared to have an equit-

able lien on the monies paid B by A and enforce the same against A?

2. If a subcontractor is paid the full amount of his subcontract and issues receipts, lien waivers and releases therefor, do such receipts, lien waivers and releases constitute a bar to an action on the same contract by a co-joint venturer of said subcontractor in the absence of any conspiracy to defraud the co-joint venturer?

STATEMENT OF THE CASE

This was an action brought by respondent seeking to recover under an alleged contract between respondent and petitioner.

The lower court and court of appeals found the following:

Petitioner was awarded a government contract for the construction of improvements for the United States Air Force Academy. Petitioner, pursuant to said contract entered into a subcontract with W. S. Conner for a portion of the work. Conner, *subsequent to the execution of his subcontract with petitioner,* entered into a joint venture agreement with respondent. Under this agreement respondent was to finance Conner for the work under Conner's contract with petitioner and was to be an indemnitor on Conner's performance and completion bond running to petitioner; and Conner and respondent were to share the profits, if any, to be derived from Conner's contract with petitioner. *Respondent did nothing to negotiate Conner's contract with petitioner. Petitioner was only aware that*

respondent was the indemnitor on Conner's bond. Petitioner at no time was ever furnished a copy of the agreement between Conner and respondent, nor was petitioner ever advised of its terms or that respondent claimed to be a joint venturer in or a party to Conner's contract with petitioner. (Emphasis supplied.)

Conner after entering into the joint venture agreement with respondent, directed petitioner, by a "Direction of Proceeds", to send payments due Conner, for work under his contract with petitioner, *to a named bank. Unknown to petitioner,* Conner had given the bank authority to endorse checks for payments and deposit them to the account of the respondent, so that respondent could be reimbursed monies advanced Conner to pay Conner's bills in connection with the work. *Both Conner and respondent were aware that any assignment of Conner's contract with petitioner, funds or otherwise, would void said contract.* All monies due Conner from petitioner for the work done were sent to the bank or were paid to Conner. All monies due Conner sent to the bank were obtained by respondent through its secret agreement with Conner. (Emphasis supplied.)

During the latter part of the work Conner and respondent began to disagree and Conner told petitioner to send no more monies due Conner to the named bank. Respondent also notified Conner's suppliers that respondent was no longer paying Conner's bills and that they would have to look to Conner. Petitioner then began to pay Conner's bills directly. Respondent then informed petitioner that it claimed an interest in the remaining monies to be paid Conner under petitioner's contract.

Conner submitted a voucher to petitioner purporting to be for Federal and State taxes chargeable against Conner in connection with the work. These taxes, unknown to petitioner, were not all chargeable against the work. Petitioner paid the amount of the voucher to Conner and Conner apparently converted a part of the money to his own use. Petitioner paid Conner the entire subcontract price and Conner executed receipts, lien-waivers and releases to petitioner.

The lower court and court of appeals held that petitioner, by paying Conner the voucher amount for taxes not chargeable to the work, and for making certain other payments directly to Conner, was liable to respondent for the amount so paid under an equitable lien theory.

The basis for jurisdiction in the United States District Court for the District of Colorado was diversity of citizenship and an amount in controversy exceeding Ten Thousand Dollars. The plaintiff, a citizen of Missouri, the two defendants being citizens of Texas and Arizona.

REASONS RELIED ON FOR GRANTING WRIT OF CERTIORARI

1. There is a necessity for the supervision of this court because the opinions and judgments of the lower court and court of appeals present a real and embarrassing conflict of opinion and authority between the fourth, ninth and tenth circuit courts of appeal and within the federal courts for the District of Colorado and other Districts. The principles involved in this matter are of such great importance to the public that grave injustice and confusion will result unless the matter be settled in conformity with

the existing and pronounced law within the fourth, ninth and tenth circuits and the State of Colorado. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387.

The tenth Circuit Court of Appeals in *Mitchell v. Bowman,* 123 F.2d 445 has held that under Colorado law a contract which constitutes a promise to pay one for services rendered out of a fund *created in whole or in part by the efforts of the promisee* creates a "lien" on the fund when it comes into existence in the hands of one *having notice of the contract and assenting to an assignment thereof.* The same law was announced in *Caldwell v. Armstrong,* 342 F.2d 485 (arising in Wyoming) and in *Underwood v. Phillips Petroleum Co.,* 155 F.2d 372 (arising in Oklahoma). (Emphasis supplied.)

The Ninth Circuit Court of Appeals in *United States v. Adamant Co.,* 197 F.2d 1 and *Bullen v. De Bretteville,* 239 F.2d 824 has held that one may *by manifest intent and agreement* create a security (equitable lien) for the discharge of his obligations and another discharging such an obligation, and, *if he is not a volunteer,* has the right to look to the fund created for repayment. The manifest intent must, however, be contained in the document of agreement relied upon. And *the claimed agreement must be supported by the relationship of the parties to be bound* and by the circumstances of their dealing subsequent to their entering into the relationship. (Emphasis supplied.)

The Fourth Circuit Court of Appeals in *Union Trust Co. of Maryland v. Townshend,* 101 F.2d 903, has also held that an equitable lien arises when there is an agreement that a fund in the possession of another, other than the debtor, or to come into his possession, shall be charged

with the payment of a debt, *and the person having possession or to come into possession, agrees to respect the charge and make payment from the fund when received.* In such case, the court said, the fund, when it arises, is no longer under the dominion of the debtor, but is subject to the control of another who has assumed an obligation with respect thereto; and equity enforces a lien thereon in application of the principle that it regards as done that which should have been done. (Emphasis supplied.)

The judgment of the tenth circuit court in the present case is in direct conflict with its former pronouncements and those of the fourth and ninth circuits relating to equitable liens and the basis of recovery by one asserting such a lien. The judgment grants an equitable lien to respondent on a fund arising out of a contract to which respondent is not a party, had no part in creating, had no agreement relating thereto and grants the lien on the basis of a secret agreement between respondent and a third party with whom petitioner had contracted, such third party being the only one whom petitioner was obligated to pay.

If the judgment of the tenth circuit court of appeals is allowed to stand in the present case under the facts as found by the court, no person will be free to contract for personal services without being placed in a position of being liable to someone with whom they have not contracted and have no agreement or relationship in the event the party with whom they have contracted enters into a secret agreement to share proceeds of the contract with that party.

2. Respondent and Conner were joint venturers. The tenth circuit court of appeals and lower court found that

the joint venture was formed after the execution of Conner's contract with petitioner. The tenth circuit court of appeals and lower court found that petitioner had paid Conner in full on the contract and that Conner had executed receipts, lien waivers and releases to petitioner under the contract but the court gave no consideration to these documents in the case at bar. However, the tenth circuit court of appeals has held in a companion case of *Bushman Construction Co. v. Air Force Academy, Inc.*, 327 F.2d 481 that the execution of these lien waivers, certificates of payment and releases was a matter within the objectives of the joint venture, and consequently Conner was empowered to execute such documents and they are binding upon the joint venture and constitute a bar to any action by respondent on the contract. The same result with respect to releases being a bar to an action was reached in *Wagoner v. Mountain Savings & Loan Ass'n.*, 311 F.2d 403 (10th Cir.). (Emphasis supplied.)

The tenth circuit court of appeals and the district court below, by their rulings in the present case, have so far departed from the accepted and usual course of judicial proceedings and the tenth circuit court of appeals has so far sanctioned such a departure by the district court below in ruling that the releases, receipts and lien waivers did not constitute a bar to the action that the supervision of this court is needed to prevent manifest injustice to the public in the future and confusion within the jurisdiction of the tenth circuit.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

C. Blake Hiester
Bill Earl Tom

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BUSHMAN CONSTRUCTION COMPANY, a Missouri corporation,
Plaintiff,

vs.

W. S. CONNER, an individual doing business as W. S. CONNER CONSTRUCTION COMPANY; R.P.R. CONSTRUCTION CO., an Arizona corporation,
Defendants.

Civil Action No. 6532
Findings of Fact and Conclusions of Law

This matter came on for trial to the Court on April 13, 1964, and after recess from time to time, the taking of evidence was concluded and the Court heard final argument of counsel on May 1, 1964 and took the matter under advisement.

The Court does now make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

From time to time in these findings, Bushman Construction Company will be referred to as "Bushman", W. S. Conner Construction Company as "Conner" and R.P.R. Construction Co. as "R.P.R."

This action arises out of the construction of a housing project at the Air Force Academy near Colorado Springs, Colorado, in the years 1958 and 1959.

Sometime prior to May, 1958, R.P.R. entered into a

subcontract with the prime contractors to do a portion of the project work.

Conner then negotiated with R.P.R. for a subcontract to do a portion of that work.

In the latter part of April, 1958, R.P.R. told Conner he could have the subcontract and gave Conner a letter of intent to that effect. Conner was advised by R.P.R. that a performance bond would be required.

In May, 1958, Conner contacted Bushman to enlist its assistance in helping him obtain a performance bond and financing.

Conner and R.P.R. executed the subcontract (Exhibit 4) on May 22, 1958, and the work was started on that subcontract by Smith and Lucas (a subcontractor of Conner's) on May 25, 1958.

On or about June 2, 1958, Bushman, having investigated the Conner job, advised Conner that it would prepare an agreement whereby Bushman would finance Conner and indemnify the bonding company so that Conner could furnish the performance bond required by the subcontract.

On June 3, 1958, a representative of Bushman met with Conner and its attorney, Mr. Purser, in Colorado Springs, to enter into such an agreement, and after some negotiations as to the wording of the agreement, an agreement was entered into between Conner and Bushman on June 3, 1958. (Exhibit 1.) The agreement provided that Bushman would receive all payments on the subcontract, pay all bills, and secure a performance bond in the name

of Conner, indemnified by Bushman. The agreement further provided that Bushman would pay Conner $1,000.00 a month as a drawing account, to be charged as a part of the construction costs, and all profits would be divided equally between Bushman and Conner.

At the same time, and in order to provide a means whereby Bushman would receive the payments on the subcontract, Conner executed a document entitled "Direction of Proceeds" (Exhibit 2) in which Conner directed R.P.R. to forward all payments under Conner's subcontract to the Mechanics Bank at St. Joseph, Missouri. A copy of the Direction of Proceeds was sent to R.P.R. with the request that it execute the receipt appearing at the bottom of the Direction of Proceeds. The receipt was later executed by R.P.R. Conner advised the Mechanics Bank that it had issued a directive to R.P.R. to send checks for payments due under the subcontract to that bank, and authorized Mr. Nash, the Cashier of the bank, in the absence of Conner, to endorse the checks and deposit them to the account of Bushman.

Sometime between June 15 and July 1, 1958, Mr. Rolfe and Mr. Logan, both representing Bushman, called on Mr. Rubenstein, president of R.P.R. During the course of the conversation Rubenstein was advised that Bushman had agreed to indemnify Conner's performance bond and to finance Conner. Rolfe suggested to Rubenstein that he waive the performance bond, accept Bushman's guarantee of performance, and split the bond cost of $12,000.00, thereby saving R.P.R. $6,000.00. Rubenstein refused, replying that the saving was not sufficient to justify waiving the surety bond. Thereupon Bushman supplied a surety bond executed by Conner as principal and Seaboard Surety as surety, in

which Conner was named as the sole principal and the sole contractor with R.P.R. Bushman, by a separate instrument, indemnified the surety against loss. There was nothing in the bond (Exhibit 23) or the indemnity agreement (Exhibit 21) in any way indicating that Bushman was a party to the subcontract or had or claimed to have any contractual relations with R.P.R.

Neither at the time of the foregoing conversation, nor at any other time prior to the institution of this action, was R.P.R. furnished with a copy of the agreement between Conner and Bushman. Nor was R.P.R. at any time prior to the institution of this action advised of the terms of the Conner-Bushman agreement, other than that Bushman had agreed to indemnify Conner's performance bond and finance Conner.

At no time prior to the institution of this suit was R.P.R. advised that Bushman claimed to be a joint venturer in or a party to the Conner subcontract.

Until August, 1959, R.P.R. complied with the Direction of Proceeds by sending checks for payments on the subcontract to the Mechanics Bank, payable to W. S. Conner, with the exception of four checks totalling $17,673.51, which were delivered to Conner directly and were not sent to the Mechanics Bank. These four checks were issued in October and November, 1958, and March and May of 1959 (see Exhibit 25E) and will be the subject of later findings.

In accordance with the Conner-Bushman agreement, Bushman from time to time disbursed funds for the payment of Conner's payrolls and bills. The funds disbursed consisted in part of money received from R.P.R.'s pay-

ments to Conner and in part of money advanced by Bushman.

In the period of April through July, 1959, Bushman had disbursed for costs on the subcontract substantially more than it had received. As a result, during the latter part of this period, Mr. Rolfe, of Bushman, talked to Conner and also to Rubenstein by telephone on several occasions, inquiring about payments on the subcontract.

Matters came to a head in the latter part of July and the early part of August, 1959. During that period the following events took place:

(a) Rolfe informed Conner's representative that Bushman would not pay any more bills until it received further payments on the subcontract.

(b) Thereafter and in early August, 1959, Conner notified Bushman that he would send no more bills to Bushman but that he and R.P.R. would pay the bills. At that time Conner was concerned that the nonpayment of bills would affect his abiilty to proceed with the work.

(c) Bushman paid the payroll for the period ending August 8 and the taxes incident thereto, and thereafter disbursed no other funds except for a premium on a liability insurance policy which was paid in December, 1959. Bushman also notified Conner's suppliers that Bushman was no longer paying bills for Conner and they would have to look to Conner for their money. At this time Bushman had disbursed for expenses properly chargeable to the Conner subcontract approximately $500,000.00 more than it had received from the payments sent to the Mechanics Bank. (Bush-

man's total disbursements properly chargeable to the Conner subcontract exceeded Bushman's receipts by $517,272.49.)

(d) Beginning in early August, 1959, payments made by R.P.R. on the Conner subcontract were made by checks payable jointly to W. S. Conner and his suppliers, or by checks made payable to "W. S. Conner—Capehart Job". These latter checks were deposited in a checking account in the First National Bank of Colorado Springs denominated "W. S. Conner—Capehart Job". From this account funds were disbursed for expenses properly chargeable to the subcontract by checks drawn upon that acount and signed by Conner or his employee Geary and a Mr. Rigg, a representative of R.P.R., with the exception of one check for $72,657.35, which will be the subject of later findings.

(e) Prior to the foregoing arrangement and on August 3, 1959, Bushman's attorney, Mr. DeMuth, made telephone inquiry of Rubenstein about payments on the Conner subcontract, stating Bushman had paid out substantially more than had been paid on the subcontract and he was concerned about R.P.R.'s failure to make the progress payments on the subcontract. Rubenstein informed him that the funds were being held in escrow and that he would send $150,000.00 when these funds were released.

On August 6, 1959, R.P.R. issued its check, drawn on the First National Bank of Phoenix, to Conner in the amount of $150,000.00, and in accordance with the Direction of Proceeds, sent the check to the Mechanics Bank at St. Joseph, Missouri. The Mechanics Bank, in

accordance with Conner's previous authorization (see Exhibit 3) endorsed Conner's name to the check, deposited it in the Bushman account and sent the check through regular channels for collection. On August 10th, Conner wired the First National Bank of Phoenix that the authority of anyone other than himself to endorse checks had been revoked, and instructed the bank to honor no endorsement on any checks other than his personal signature. (Exhibit 29.) Thereupon the Phoenix bank returned the check unpaid, marked "Personal endorsement of payee required as per payee's instr." (Exhibit 9). Thereafter the Mechanics Bank returned the check to the Phoenix Bank for collection or protest for non-payment. When the check was presented to the Phoenix bank for collection on August 24, 1959, it refused payment because R.P.R. in the meantime had stopped payment, and it returned the check to the Mechanics Bank for that reason.

The foregoing facts led to the institution of this action in early September, 1959. The complaint was served on Mr. Rubenstein on September 9, 1959. At that time, although the Conner subcontract work had been largely completed, there remained a very substantial amount yet to be paid for expenses chargeable to Conner for work then done and to be done to complete the Conner subcontract.

Th total contract price under the Conner subcontract was $2,184,600.00. R.P.R. paid to Conner and to Conner and its suppliers a total of $2,196,862.83. (See Exhibits 27 and 27-A.) These funds, with two exceptions hereinafter mentioned, were applied to the payment of bills and expenses properly chargeable to the Conner subcontract in one of three ways:

(a) By checks drawn by R.P.R. payable to Conner, sent to the Mechanics Bank, deposited to Bushman's account and disbursed by Bushman for expenses properly chargeable to the Conner subcontract;

(b) By checks drawn by R.P.R. payable to "W. S. Conner—Capehart Job", deposited in the "W. S. Conner—Capehart Job" bank account and disbursed therefrom by checks for expenses properly chargeable to the Conner subcontract;

(c) By checks drawn by R.P.R. and made payable jointly to W. S. Conner and his creditors for expenses properly chargeable to the Conner subcontract.

The first exception to the foregoing findings are four checks drawn by R.P.R. payable to W. S. Conner, which were not sent to the Mechanics Bank but were delivered by R.P.R. to Conner. These checks are as follows:

Check No. 711 dated October 27, 1958, for	$ 822.35
Check No. 776 dated November 21, 1958, for	1,344.80
Check No. 989 dated March 13, 1959, for	6,434.18
Check No. 1133 dated May 28, 1959, for	9,072.13
Total	$17,673.51

(See Exhibit 25-E.)

There is no evidence that the proceeds of these checks were used to pay expenses properly chargeable to the Conner subcontract and the Court finds that the proceeds were not used to pay such expenses.

The other exception pertains to check number 1615 (Exhibit 27-A) dated October 21, 1959, for $72,657.35, which is shown on Exhibit 27 as having been disbursed for the following purposes:

Director of Internal Revenue	$44,390.44
State of Colorado Tax Division	7,990.87
State Compensation Insurance Fund	20,276.04
Total	$72,657.35

As to this check the Court finds that on October 21, 1959, after the subcontract had been completed, Conner wrote to R.P.R. (Exhibit SS-1), attaching a list of the final bills yet to be paid. This list included an item of $72,657.35 to pay F.I.C.A., federal and state withholding taxes, federal excise taxes, state unemployment taxes and premiums on compensation insurance. (See Exhibit SS-3). Thereupon R.P.R. drew the check No. 1615 payable to "W. S. Conner—Capehart Job" and delivered it to Conner.

Although this check was made payable to "W. S. Conner—Capehart Job", it was never deposited in the W. S. Conner—Capehart Job bank account, nor were the proceeds of that check used for the purposes set out in Exhibit 27 and Exhibit SS-3. This check for $72,657.35 was endorsed by Conner and presented to the First National Bank in Colorado Springs, and at his request the bank sent the check through channels for collection. When the proceeds were received by the bank, the bank issued its Cashier's check to "W. S. Conner, Capehart Job" for that amount. Conner then surrendered that Cashier's check to the bank and obtained in lieu thereof the following Cashier's checks, all dated October 28, 1959:

No. 47947 payable to State of Colorado Department of Revenue	$ 597.18
No. 47948 payable to Department of Employment, State of Colorado	2,092.40

No. 47949	payable to Director of Internal Revenue	13,825.28
No. 47950	payable to W. S. Conner	6,142.49
No. 47951	payable to W. S. Conner	10,000.00
No. 47952	payable to W. S. Conner	10,000.00
No. 47953	payable to W. S. Conner	10,000.00
No. 47954	payable to W. S. Conner	10,000.00
No. 47955	payable to W. S. Conner	10,000.00
Total		$72,657.35

The payees named in Cashier's checks 47947 and 47949 received the proceeds of these checks for expenses properly chargeable to the subcontract. Cashier's check No. 47948, payable to the Department of Employment, State of Colorado, was endorsed and cashed by Conner and he and not the payee received the proceeds of that Cashier's check. He also received the proceeds of the remaining Cashier's checks. In short, the Court finds that the disposition of the proceeds of the check for $72,657.35 was as follows:

State of Colorado Department of Revenue	$ 597.18
Director of Internal Revenue	13,825.28
W. S. Conner	58,234.89

The Court finds that the latter sum of $58,234.89 was not applied to the payment of expenses properly chargeable to the Conner subcontract.

The Court further finds that Conner breached his agreement with Bushman in accepting and receiving from R.P.R. checks numbered 711, 776, 989 and 1133 totalling $17,673.51, instead of having said checks forwarded to the Mechanics Bank in accordance with the Conner-Bushman agreement. The Court having previously found that the proceeds of these checks were not applied to expenses

properly chargeable to the Conner subcontract, the plaintiff Bushman has been damaged by such breach in the amount of $17,673.51.

The Court further finds that after Bushman had advised Conner that it would pay no further bills, and Conner thereafter made arrangements with R.P.R. to pay the bills themselves, Conner was under a duty to Bushman to see to it that all future payments made on his subcontract with R.P.R. were applied to the payment of expenses properly chargeable to that subcontract or to pay said funds to Bushman. Conner breached this duty when he failed to either apply to expenses properly chargeable to the project or deliver to Bushman $58,234.89 which he personally received fom the proceeds of the check for $72,-657.35. By reason of Conner's breach of duty to Bushman in this respect, Bushman has been damaged in the amount of $58,234.89.

The Court further finds that under the facts as found, R.P.R. was under a duty to Bushman to either send the checks for payments due to the Conner subcontract to the Mechanics Bank or to see to it that the payments so made on the Conner subcontract were applied to expenses properly chargeable to that contract.

R.P.R. breached this duty in failing to send to the Mechanics Bank checks numbered 711, 776, 989 and 1133, totalling $17,673.51, or in seeing to it that the proceeds of these checks were applied to expenses properly chargeable to the Conner subcontract. By virtue of this breach of duty, Bushman has been damaged in the amount of $17,673.51.

R.P.R. also breached the duty which it owed to Bush-

man in failing to see to it that the proceeds of check 1615 for $72,657.35 were applied to expenses properly chargeable to the Conner subcontract, or in the alternative, sending said check to the Mechanics Bank. As a result of the breach of this duty, Bushman has been damaged in the amount of $58,234.89.

Bushman was entitled to receive the proceeds of checks numbered 711, 776, 989 and 1133 and $58,234.89 of the proceeds of check 1615, on or about the dates that said checks were issued, and having failed to receive the proceeds or partial proceeds of said checks at those times, Bushman is entitled to recover interest at the rate of 6% per annum computed from the date of said checks to this date, which amount is the sum of $11,772.83.

The Court finds that R.P.R. did not at any time or in any manner whatsoever conspire with Conner to defraud Bushman, nor did R.P.R. at any time act or fail to act with any purpose or intent to defraud Bushman or in furtherance of a conspiracy to defraud Bushman.

The Court further finds that the delivery by R.P.R. of checks 711, 776, 989 and 1133 to Conner, contrary to the Direction of Proceeds, was not done with any purpose or intent to defraud Bushman or in furtherance of any conspiracy between Conner and R.P.R. to defraud Bushman.

The Court further finds that the issuance and delivery of check 1615 by R.P.R. to Conner was done in reliance upon Conner's reperesentation that the funds would be used by Conner for the purposes set forth in Conner's written request for issuance of that check and Conner's representation that the items listed in the request were

expenses properly chargeable to the subcontract (see Exhibit SS-1-3); and that check 1615 was not issued and delivered to Conner with any intent and purpose by R.P.R. to defraud Bushman or in furtherance of any conspiracy between R.P.R. and Conner to defraud Bushman.

Conner counterclaimed against Bushman for $18,000.00 which is claimed by Conner under the provisions of the Conner-Bushman agreement providing for the payment of $1,000.00 per month by Bushman to Conner, to be charged as a part of the costs of construction.

As to this counterclaim, the Court finds that Bushman paid to Conner $3,000.00 in accordance with the drawing account agreement and that all further payments under this provision of the contract were waived by Conner, and entitled to no recovery on his counter claim against Bushman.

CONCLUSIONS OF LAW

1. Conner was under a duty to Bushman not to accept, receive or cash checks numbered 711, 776, 989 and 1133 totalling $17,673.51. By accepting and cashing those checks and retaining the proceeds therefrom, Conner breached his duty to Bushman to Bushman's damage ni the amount of $17,673.51.

2. Conner was under a duty to pay to Bushman $58,234.89 of the proceeds of check No. 1615 for $72,657.35; that Conner breached this duty by receiving and retaining $58,234.89 of the proceeds of said check, to Bushman's damage in that amount.

3. R.P.R. was under a duty to Bushman to either

send all payments due on the Conner subcontract to the Mechanics Bank or see to it that all payments made on the Conner subcontract were applied to the payment of expenses properly chargeable to that subcontract. R.P.R. breached this duty when it delivered to Conner checks numbered 711, 776, 989 and 1133, totalling $17,673.51, and check numbered 1615 in the amount of $72,657.35, and failed to see to it that the proceeds of said checks were applied to expenses properly chargeable to the Conner subcontract. As the result of a breach of this duty, Bushman has been damaged in the amount of $75,908.40.

4. Under the provisions of Colorado Revised Statutes 1953, Section 73-1-1 and 73-1-2, Bushman is entitled to recover interest in the amount of $11,772.83.

5. Bushman Construction Company is entitled to judgment against W. S. Conner, an individual doing business as W. S. Conner Construction Company, in the amount of $87,681.23.

6. Bushman Construction Company is entitled to judgment against R.P.R. Construction Company in the amount of $87,681.23.

7. The total recovery by Bushman on either or both of these judgments is limited to the sum of $87,681.23.

IT IS THEREFORE ORDERED that the Clerk of this Court forthwith enter judgment in favor of Bushman Construction Company and against W. S. Conner, an individual doing business as W. S. Conner Construction Company, in the amount of $87,681.23, and in favor of Bushman Construction Company and against R.P.R. Con-

struction Co. in the amount of $87,681.23, provided, however, that the total recovery on either or both of these judgments shall be and is hereby limited to the sum of $87,681.23.

DATED at Denver, Colorado, this 5th day of May, 1964.

By the Court: Hatfield Chilson, Judge United States District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September Term—1965

BUSHMAN CONSTRUCTION COMPANY, a Missouri Corporation,
Appellant,
v.
W. S. CONNER, an individual, doing business as W. S. CONNER CONSTRUCTION COMPANY; and R.P.R. CONSTRUCTION COMPANY, an Arizona corporation,
Appellees.

No. 7858

R.P.R. CONSTRUCTION COMPANY, an Arizona corporation,
Cross-Appellant,
v.
BUSHMAN CONCTRUCTION COMPANY, A Missouri Corporation,
Cross-Appellee.

No. 7859

Laurence W. DeMuth, Jr., of the Firm of Akolt, Shepherd & Dick, Denver, Colorado, and Richard U. Simon, of the Firm of Simon & Simon, Fort Worth, Texas, (Stuart S. Gunckel of the Firm of Akolt, Shepherd & Dick, Denver, Colorado, with them on the brief), for Bushman Construction Co., appellant and cross-appellee.

C. Blake Hiester and Bill Earl Tom, of the Firm of Hiester, Tanner and Clanahan, Denver, Colorado, for R.P.R. Construction Co., appellee and cross-appellant.

Before MURRAH, Chief Judge, and PICKETT and SETH, Circuit Judges.

PICKETT, Circuit Judge.

Bushman Construction Company brought this action against W. S. Conner and R.P.R. Construction Company[1], to recover money alleged to be due in connection with the performance of a subcontract on a military housing project at the United States Air Force Academy near Colorado Springs, Colorado. On a former appeal we reversed a summary judgment in favor of R.P.R. and remanded the case for trial. *Bushman Construction Co. v. Conner,* 307 F.2d 888[2]. Upon trial Bushman recovered judgment in the sum of $87,681.23, and appeals on the ground that the award is inadequate. R.P.R. cross-appeals, contending that as a matter of law, it was under no obligation to Bushman. Briefly stated, the pertinent facts are: In April of 1958, R.P.R. negotiated with Conner for a subcontract to perform a substantial portion of its contract for construction to the aforesaid housing unit. On April 25, R.P.R. delivered to Conner a letter of intent to award to Conner a subcontract whereby it agreed to pay to Conner the sum of $2,184,600.00 for the work to be performed. Conner was in need of financial assistance and discussed the matter with Bushman. Bushman agreed to furnish the performance bond and the necessary finances to complete the subcontract. On May 22, 1958, the subcontract was executed by R.P.R. and Conner. Early in June, Bushman sent a representative to Colorado Springs to investigate the work to be done. The representative reported to Bushman that the contract was satisfactory and recommended that Bushman enter into an agreement with Conner to participate in its performance. On June 2, 1958, Bushman and

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[1]The parties will be referred to as "Bushman", "Conner", and "R.P.R."

[2]The same subject matter was later before the court in a companion case wherein Bushman unsuccessfully sought to establish a lien under the general lien statutes of Colorado. Bushman Construction Co. v. Air Force Academy Housing, Inc., et al., 327 F.2d 481.

Conner entered into a contract which, throughout these proceedings, has been recognized by the parties as creating a joint adventure. The contract provided that Bushman was to furnish the required bonds, pay all bills necessary to complete the contract, and allow Conner to draw $1,000 per month. All payments due from R.P.R. were to be made to the Mechanics Bank at St. Joseph, Missouri, where they were to be credited to Bushman's account. After the job was completed and accepted, Bushman was required to pay Conner 50% of the funds remaining in its possession. On the same day, Conner executed and delivered an instrument directing R.P.R. to forward all proceeds due under the Conner subcontract to the St. Joseph bank[3]. R.P.R. acknowledged receipt of the latter instrument and made payments accordingly for more than one year. Within a week or ten days after the Bushman-Conner arrangement, a representative of Bushman called on R.P.R.'s president and advised him of the contract and that he was there to assist in any way that he could. The president replied that "he was glad to see us on the job in connection with Conner."

As the work progressed on the subcontract, R.P.R. forwarded to the St. Joseph bank all progress payments. In June of 1959 these payments totaled over $1,400,000.00. At that time Bushman had paid out approximately $1,900,000.00, and refused to make any further advances until additional funds due on the subcontract were paid. After conferences with representatives of Bushman, R.P.R. agreed to forward $150,000.00, and to later deliver additional sums which were being held in escrow. On August 6, 1959, R.P.R.'s check for $150,000.00, drawn on the First

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[3]These instruments are set forth in Footnote 2, Bushman Construction Company v. Conner, 307 F.2d 888, 890.

National Bank of Phoenix, Arizona, was sent to the St. Joseph bank. Conner's name was endorsed on the check in the usual manner and the amount deposited to Bushman's account. In the meantime, Conner notified the Phoenix bank that authority to endorse the check had been revoked. R.P.R. then stopped payment on the check and it was never paid. When no more proceeds were forthcoming, Bushman notified creditors and suppliers that they would have to look to Conner for their money. At that time most of the work on the subcontract had been completed, but there remained accounts upon which there was due a substantial amount chargeable against the subcontract for work completed and to be completed.

Following the discontinuance of the Bushman-Conner arrangement, R.P.R. disbursed funds due on the subcontract jointly to Conner and creditors for settlement of expenses properly chargeable to the Conner subcontract, or to a bank account over which R.P.R. had control.[4] In addition, there were payments made to Conner directly which were not applied to expenditures chargeable against the subcontract. These payments, together with interest, totaled $87,681.23. The trial court held that "R.P.R. was under a duty to Bushman to either send the checks for payments due on the Conner subcontract to the Mechanics Bank, or see to it that the payments so made on the Conner subcontract were applied to expenses properly chargeable to that subcontract", and that Bushman was entitled to recover all sums not so applied.

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[4]R.P.R.'s president testified that this procedure was adopted to make certain "that all funds that were to go on the job were to go to suppliers, laborers, equipment rental, and so forth. We took whatever precautions we could at that time to make sure that the money would go to people who had furnished materials, et cetera, to the job."

Although it is conceded that R.P.R. knew that Bushman had agreed to indemnify the surety on Conner's bond, and was involved in the subcontract, the trial court found that R.P.R. was not furnished with a copy of the agreement between Conner and Bushman, and that "at no time prior to the institution of this suit was R.P.R. advised that Bushman claimed to be a joint venturer in or a party to the Conner subcontract." This finding is supported by the record. The court also found that R.P.R. did not conspire with Conner to defraud Bushman, and that the delivery of checks to Conner contrary to the instrument directing the payment of the proceeds to the St. Joseph bank was not for the purpose of defrauding Bushman or to further a conspiracy between Conner and R.P.R. to deprive Bushman of the benefits of the Conner subcontract. This finding is also supported by the record. In the former appeal we held that these were factual questions to be determined by a trial. With these facts established there remains the question of whether R.P.R. has any further duty to Bushman. As we interpret the trial court's conclusion, Bushman had a lien on the funds in possession of R.P.R., and that R.P.R. an experienced contractor, had sufficient notice of the lien to be bound by it. Under the circumstances, unless clearly erroneous, the determinations by the trial court of applicable Colorado law will be upheld. *First National Bank & Trust Co. of Oklahoma City, Okla. v. Foster,* 10 Cir., 346 F.2d 49, and cases cited.

The evidence establishes without dispute that for over one year R.P.R. sent all of the Conner checks to the Mechanics Bank at St. Joseph, Missouri, where they were endorsed and the money deposited to Bushman's account. Although R.P.R. did not know the details of the contractual relationship between Bushman and Conner, it did know

that during this time Bushman used these funds to pay for labor and material furnished to the Conner subcontract, and knew that the "Direction of Proceeds" instrument was for Bushman's protection. It knew that Bushman had paid out, for the benefit of the Conner subcontract, about $500,000.00 more than it had received. R.P.R. knew from conferences with Bushman's representatives that these advances were chargeable to progress payments due. These conferences and requests for additional payments resulted in the delivery of a $150,000.00 check, which was never paid.

The trial court's theory of liability is based upon the rule announced in *School Dist. No. 3 v. Central Savings Bank & Trust Co.*, 113 Colo. 487, 159 P.2d 361, and *Mitchell v. Bowman*, 10 Cir., 123 F.2d 445. See also, *Clatworthy v. Ferguson*, 72 Colo. 259, 210 P. 693; *American Agency & Investment Co. v. Gregg*, 90 Colo. 142, 2 P.2d 1101. These cases establish a right in the nature of a lien in favor of one who assists in bringing a fund into existence. Undoubtedly Bushman's contribution to the Conner subcontract was to a large extent responsible for the creation of the fund held by R.P.R. For more than one year all the proceeds from the Conner subcontract went to Bushman, who was required to use any funds received by him to discharge claims against that contract. When a dispute arose between Bushman and Conner, R.P.R. assumed the responsibility of using the remaining amounts due on the subcontract to discharge claims against that contract. When R.P.R. paid claims properly chargeable against the subcontract, it discharged obligations for which Bushman was liable, consequently it was not injured by R.P.R.'s failure to deliver the funds to it. No contention is made that there was any money in the possession of R.P.R. after these payments were made.

The claim that R.P.R. is liable on the $150,000.00 check which it issued to Conner and which was endorsed to Bushman, is without merit. All of the funds which R.P.R. had, including the $150,000.00 were held to discharge obligations of the Conner subcontract, and were so used. If the money represented by the check had been received by Bushman, it would have been used for the same purpose.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7263—December Term—1963

BUSHMAN CONSTRUCTION COMPANY,
Appellant,

v.

AIR FORCE ACADEMY HOUSING INCORPORATED, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER TWO, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER THREE, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER FOUR, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBE FIVE, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER SIX, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER SEVEN, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER EIGHT, AIR FORCE ACADEMY HOUSING INCORPORATED NUMBER NINE, THE MARYLAND CASUALTY COMPANY, THE STATE TEACHERS' RETIREMENT BOARD OF OHIO, DEL E. WEBB CONSTRUCTION CO., R.P.R. CONSTRUCTION CO., RUBENSTEIN CONSTRUCTION CO., STATE TREASURER OF COLORADO, and THE COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION,
Appellees.

Appeal From The United States District Court
For The District of Colorado

Laurence W. DeMuth, Jr., Denver, Colo. (Akolt, Shepherd & Dick, Denver, Colorado and Carl F. Eiberger, Denver, Colorado, were with him on the Brief), for Appellant.
C. Blake Hiester and Bill Earl Tom, Denver, Colo. (Heister, Tanner & Clanahan, Denver, Colo., were with them on the Brief), for Appellees, The Maryland Casualty Company, Del E. Webb Construction Co., R.P.R. Construction Co., and Rubenstein Construction Co.

Before LEWIS, HILL and SETH, Circuit Judges.

SETH, Circuit Judge.

This is a companion case to *Bushman Construction Co. v. Conner*, 307 F.2d 888 (10th Cir.), and now pending in the United States District Court for the District of Colorado.

The trial court granted motions to dismiss and motions for summary judgment on behalf of the various defendants. Bushman Construction Company, the plaintiff below, is appealing such orders.

The present diversity action is based primarily on the general lien statutes of Colorado, Colo. Rev. Stat. 1953 Ann., §§ 86-3-1 to -24, and also contains a separate in personam cause of action. Plaintiff-appellant aserts two liens: One for $720,819.95 by reason of the performance of a subcontract known as Subcontract 581, and the other by virtue of the assignment of a lien from The Harrison Engineering & Construction Corporation for $25,125.00. Both of the liens are claimed against certain property in the Armed Forces Housing (Capehart) project at the Air Force Academy in El Paso County, Colorado. Defendants, Del E. Webb Construction Co. (Webb) and Rubenstein Construction Co. (Rubenstein), were prime contractors on this project, and The Maryland Casualty Company was the surety on the prime contractors' bond. R.P.R. Construction Co. (R.P.R.), a first tier subcontractor under Webb and Rubenstein, in turn subcontracted a part of its work to the plaintiff-appellant and its alleged joint venturer, W. S. Conner, by the execution of Subcontract 581. The appellee housing corporations of Delaware are the owners of the leasehold estates and the improvements which were constructed. The State Treasurer of Colorado and The Colorado Public Employees' Retirement Association are joined as defendants by reason of the fact

that they are the present owners of the mortgages on the subject leaseholds.

The complaint alleges that the appellant and Conner, as joint venturers, undertook to perform Subcontract 581. Appellant claims that it furnished services, material and labor which contributed to the completion of the work and that appellant received $1,463,780.05 of the contract price of $2,184,600.00. Appellant seeks the difference, $720,819.95, by way of foreclosing a statutory lien. W. S. Conner is not named in the complaint as a party and was not initially joined or served.

As to the assigned lien, the complaint recites the assignment of a $25,125.00 lien claim to the appellant from The Harrison Engineering & Construction Corporation and prays for judgment in this amount, together with a decree foreclosing the lien. This lien arose from the performance of Subcontract 581, but was assigned to appellant individually.

The complaint also seeks a judgment against appellee, The Maryland Casualty Company, for each amount on bonds it executed as surety for the prime contractors.

On December 20, 1960, the motion of The Maryland Casualty Company to dismiss was granted on the ground that Conner, appellant's joint venturer, was an indispensable party to the action and had not been served with process. This order of dismissal was later applied by a subsequent order to all matters contained in the complaint.

On December 20, 1960, the housing corporations' motion to dismiss was also granted on the ground that Conner

was an indispensable party to the claim under Subcontract 581. The court on the same day denied the motion to dismiss as to the claim of the appellant as assignee of the Harrison claim.

Webb's motion for summary judgment on the ground that payment had been made, that there was no privity between Webb and appellant, and that Conner was an indispensable party was granted on December 28, 1960.

Thereafter appellant moved for an order vacating or modifying the order of dismissal entered on December 20, 1960, to allow the appellant time to serve Conner. At the same time, approximately, appellant filed a motion seeking authority to serve Conner and other parties outside the District pursuant to 28 U.S.C. § 1655, and this motion was granted. On February 6, 1961, the court denied the appellant's motion to modify the order of dismissal of December 20, 1960. On March 16, 1961, Conner filed his answer, pleading the merits of the case. He denied all the allegations of the complaint and expressly denied there was ever a joint venture.

On April 11, 1961, Webb, Maryland, and the housing corporations filed a joint motion for summary judgment as to the assigned Harrison lien. This joint motion was granted on September 25, 1962, on the ground that under Colorado law, rental of equipment could not be the basis for a lien.

The motion for summary judgment filed by Rubenstein and R.P.R. relating to all of appellant's claims was granted September 25, 1962. As to Subcontract 581, the grounds for dismissal were payment and lack of privity of

contract between the appellant and these appellees as noted in the December 28, 1960, order. As to the assigned claim, the ground for granting the summary judgments was that the work was not lienable and there was no privity.

Summary judgment in the September 25, 1962, order was also granted to the State Treasurer of Colorado and The Colorado Public Employees' Retirement Association, the housing corporations, and Webb on the same grounds. An order for final judgment was entered on October 25, 1962.

I.

The Claim Under Subcontract 581

"Under this subcontract to W. S. Conner, which the complaint alleges was performed by a joint venture of appellant and Conner, the claim is made that there is an unpaid balance of $720,819.95. The complaint seeks personal judgments against the appellees and also asserts a lien against the property on which the improvements were constructed.

To dispose of the motions, the trial court properly considered the complaint, depositions, motions, exhibits, and admissions all together. In doing this, the allegations in the pleadings may be evaluated in the light of the depositions and the additional factual material before the court and a determination made whether material isues of fact actually exits. After this has been done, should no material fact "dispositive of right or duty remain in the case," summary judgment is proper. See

Bushman Construction Co. v. Conner, 307 F.2d 888 (10th Cir.), and cases therein cited.

The record before us contains nine final payment and waiver of lien certificates signed by W. S. Conner. The record further shows that the entire amount due on Subcontract 581 was paid by R.P.R. to Conner or on his accounts. The complaint and the claim of lien assert there was a joint venture between appellant and Conner in the performance of Subcontract 581. Appellant in its complaint is asserting the joint venture did not receive the full payment. The record shows that W. S. Conner was in charge of the performance of the work under the subcontract. Appellant entered the picture primarily in the role of financier and to provide a performance bond. The record shows no dispute between the joint venture and R.P.R. as to the performance of the work. There is no substantial question of fact remaining on the question of payment and waiver of liens. There is a legal question as to whether Conner as one of the joint venturers could execute releases and payment certificates binding on the joint venture.

The authorities universally hold that the action of one joint venturer which relates to the object for which the venture was formed is binding on the other parties. In the companion case, *Bushman Construction Co. v. Conner,* supra, it was stated by this court that there was this joint venture between Bushman and Conner. The court then stated, "as a general proposition, the substantive law of partnerships is applicable to joint adventures," citing *Taylor v. Brindley,* 164 F.2d 235 (10th Cir.). The court then continued: "The application of partnership law in-

vokes agency rules since a partner is the agent for the other partners." In the cited decision, the court indicated that the Colorado Supreme Court had not passed on the specific question but that it was felt likely it would follow the principles indicated above. In the case at bar, the execution of waivers of lien and certificates of payment was a matter within the objectives of the joint venture, and consequently Conner was empowered to execute such documents and they are binding upon the joint venture.

The Colorado Supreme Court has held in *Bishop v. Moore,* 137 Colo. 263, 323 P.2d 897, that an indebtedness in favor of the claimant must exist before a valid lien claim may be made. Thus the execution of the waiver of lien and payment certificates defeats appellant's cause of action both as to the asserted lien under this Subcontract 581, and as to the personal judgments sought thereon against all appellees. The trial court properly granted the motions for summary judgment. In these circumstances, summary judgment was an appropriate remedy. *Wagoner v. Mountain Savings & Loan Ass'n,* 311 F.2d 403 (10th Cir.)."

The appellant in its brief seeks to place the appellee, The Maryland Casualty Company, in a different position. This appellee, as above mentioned, was the surety on the performance bonds of the prime contractors. The appellant sought judgment against this appellee on these bonds. The trial court granted motions by this appellee to dismiss on the ground that Conner was an indispensable party and had not been served. However since appellant's claim for personal judgment and also claim of lien against the prime contractors and their subcontractor R.P.R. Con-

struction Company must fail by reason of the fact that payment in full had been made on the subcontract and the certificates duly issued, it necessarily follows that the personal judgment on this subcontract sought against The Maryland Casualty Company on the same facts must likewise fail. The obligation on the part of the principal has been met, and no cause of action can be asserted against the surety. Thus The Maryland Casualty Company was properly dismissed from the action, although the grounds for dismissal should have been those indicated above. Our consideration of this dismissal relates only to the cause of action based on Subcontract 581.

The in personam cause here alleged against R.P.R. is one which asserts in effect that payment was not made under Subcontract 581. This contention fails, as discussed above, because the record shows that all payments were made to one of the joint venturers. Thus R.P.R. has performed under Subcontract 581 to the extent of making the payment to Conner or on his accounts, and that is the only question to be disposed of. The question whether or not R.P.R. should have paid these sums to another of the joint venturers, and the effect of a document concerning the application of payments, is not here concerned. This is an issue in the companion case pending in the District Court, and this opinion is not intended to affect such issue in any way.

II.

The Assigned Lien

The principal question concerning the lien assigned to appellant by The Harrison Engineering & Construction

Corporation is whether a person renting equipment to a contractor can claim a lien under Colorado statutes[1].

The equipment rented consisted of a water truck, dozer, motor grader, two pickup trucks, and two air compressors. It was rented to the joint venture of the appellant and Conner to be used in the performance of Subcontract 581. The record contains a deposition by an employee of appellant stating that the officers and directors of appellant and of The Harrison Engineering & Construction Corporation are the same, and that the stockholders are also the same with the same proportional stock interests in each. The claim of lien was for the invoice amounts of rental plus invoiced charges for hauling the equipment.

There do not appear to be any reported Colorado cases on the point. The parties rely upon several deci-

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[1]Colo. Rev. Stat. 1953 Ann., § 86-3-1:

"Mechanics, material men, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway or any other structure or improvement upon land, and also architects, engineers, draftsmen and artisans who have furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other professional or skilled service, or bestowed labor in whole or in part, describing or illustrating, or superintending such structure, or work done or to be done, or any part connected therewith, shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials or mining or milling machinery or other fixtures, for the value of such services rendered or labor done or material furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as agent, contractor, or otherwise, for the work or labor done or services rendered or materials furnished, by each respectively, whether done or furnished or rendered at the instance of the owner of the building or other improvement, or his agent; and every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this article."

sions in Colorado on related points and containing general language. It is necessary under these circumstances to consider these cases in some detail to determine what the Colorado courts have indicated the answer would be.

The first to be considered is the early case of *Rara Avis Gold & Silver Mining Co. v. Bouscher,* 9 Colo. 385, 12 Pac. 433 (1886). In this case the plaintiff asserted a mechanic's lien for his services as foreman, superintendent, mechanic, and as defendant's agent in disbursing its money and in keepig its accounts. The general Colorado lien statute then provided: "All artizans, mechanics, and others who shall perform work or labor . . . for the construction or repair of any building, or other superstructure, shall have, and may claim and hold, a lien . . . ." The court held that the plaintiff's services in planning and superintending development work and the erection of the mill were labor upon the property within the meaning of the statute. The court observed that liens are allowed for many kinds of labor that the authorities term "incidental," such incidental labor must be directly done for, and connected with, or actually incorporated into, the building or improvement. It is also said that protection cannot be extended to those services indirectly and remotely associated with the construction work. Also the cook who prepares the food for the employees, the blacksmith who shoes the horses or repairs the implements in use, and all similar contributors to the enterprise are not among the favored workmen.

The second Colorado case is *Lindemann v. Belden Consol. Mining & Milling Co.,* 16 Colo. App. 342, 65 Pac. 403 (1901). The court there held that a geologist and mining expert who had contracted to explore certain mines

and surrounding country was not entitled to assert a lien for such services. The court said that a mechanic's lien statute should be liberally construed as to the remedial portion of it, but must be strictly construed in determining the question as to whether the right to a lien exists. Also it noted that the principle of such statutes is to give security to materialmen and mechanics in or on values that they have directly contributed to create. The court said further that it would be judicial legislation for courts to extend their provisions so as to include demands not fairly covered by the statutory language used, and that protection should not be extended to services indirectly and remotely associated with the construction work.

Later in *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786 (1903), the court considered claimed liens for labor and materials supplied to a contractor. The primary question there appeared to be the constitutionality of the statute; but the court also discussed liens generally and observed that the construction of a building is a cooperative venture, and the accomplishment of the work requires the purchase of material and the employment of mechanical and other labor, of all of which, the owner receives the benefits. Also the court noted that the underlying doctrine is that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim on the property for the value of his labor or materials. The court then said that according to the statute, the liens were not to benefit just mechanics, but "others" as well. The Colorado court there stated that the Colorado act was evidently modeled on California's.

There followed *Farmers Irrigation Co. v. Kamm*, 55

Colo. 440, 135 Pac. 766 (1913), which concerned a lien on a ditch and reservoir claimed on account of materials furnished to Harris, a subcontractor. Hokasona contracted to build up the banks of the ditch and to enlarge the dam of the reservoir; Hokasona subcontracted this work to Harris. Harris was not to supply materials and was to be paid according to the amount and type of earth moved. Harris purchased lumber and hardware items from the plaintiff which were used to erect sheds and bunkhouses. The court held that these materials, in these circumstances, did not establish a lien under the Colorado statute. The court went on to say that under such statute, in order for one to have a lien, the material must be used in the construction of the structure so as to become a part of it when completed. It said also that the fundamental principle upon which mechanics' liens are based is that labor and material have gone into the property of another and made it more valuable, so that when the owner is called upon to protect his property from a lien by paying for the labor or material, he is but paying for something that he has received. The court stated that it would be violative of the fundamental principle and would be extending the provisions of the statute to hold that a lien exists for materials there furnished. The court noted that the materials were used about the job as an aid to him as tools and appliances are aids, and were not intended to go into the structure or to be directly consumed in its betterment, but are to be taken away when the work is completed, as the tools and appliances are taken away. It held that before a lien may be claimed, it is necessary that the material furnished be actually used and wrought into the structure to become a part thereof, or if not, it be directly consumed in its betterment, and be of the kind

called for in the contract between the contractor and subcontractor before a lien will lie therefor.

The Colorado Supreme Court in *Great Western Sugar Co. v. Gilcrest Lumber Co.*, 25 Colo. App. 1, 136 Pac. 553 (1913), had before it an interpretation of the lien statute in relation to the allowable amount of a lien and the necessity of notice. The court considered liens generally and said that the theory of the Colorado statute was that liens were allowed because of the enhanced value of the property caused by the labor and material so contributed to it by the consent of the owner through his contractor.

In *Brannan Sand & Gravel Co. v. Santa Fe Land & Improvement Co.*, 138 Colo. 314, 332 P.2d 892 (1958), a claim of lien was made by a subcontractor for paving a roadway, and the court after quoting a part of the statute here involved said:

> "The above basic provision of the statute has been retained virtually intact as it appears in Mills Annotated Statutes (1891) vol. 2, sec. 2867, down to the present. In the express words of the statute, containing, as we believe, no ambiguity, there are two limitations on the lien involved. First, it is granted only upon the property upon which the labor, services and material are bestowed or rendered; second, only to the extent of the *Value* of the labor, services and material *rendered upon the property.*"

The Brannan case just quoted from is not one involving the rental of equipment, but the specific limitation laid down by the court that the lien is only for the value of the labor, services, and materials rendered on the property is significant. This, considered with the Farmers

Irrigation case which concerned materials, clearly held that materials furnished must be wrought into the structure to become a part of it when completed, in order to claim a lien. It also stated that a contractor's "aids" as his tools and appliances not intended to go into the structure or be consumed, but to be taken away when the job is done, are not within the statute. These cases, with the indications in the others cited, lead us to the conclusion that under Colorado law, rental fees for equipment provided to a contractor cannot serve as a basis for a lien. This seems to be in accord with the majority of courts which have considered the matter; however, comparisons are difficult because of variations in the statutes. A few of the cases are *Potter Mfg. Co. v. A. B. Meyer & Co.*, 171 Ind. 513, 86 N.E. 837; *Henry Bickel Co. v. National Surety Co.*, 156 Ky. 695, 161 S.W. 1113; *Steele & Lebby v. Flynn-Sullivan Co.*, 245 Ky. 772, 54 S.W.2d 325; *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670; *National Surety Corp. v. Highland Park Country Club*, 240 La. 747, 125 So.2d 151; *Sundberg v. Boeing Airplane Co.*, 52 Wash.2d 734, 328 P.2d 692; *Lohman v. Peterson*, 87 Wis. 227, 58 N.W. 407; *Bunting Hardware Co. v. Baker*, 116 Kan. 688, 229 Pac. 72; *Thomas v. Commonwealth*, 215 Mass. 369, 102 N.E. 428.

In *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786, as mentioned above, the court stated that Colorado's lien law was modeled after the California act. The New Mexico Supreme Court in the recent case of *Lembke Construction Co. v. J. D. Coggins Co.*, 72 N.M. 259, 382 P.2d 983, stated that its act was also taken from California, although perhaps not at the same time as was Colorado's, and expressly held that a lien could not be claimed for the rental of equipment. The New Mexico court there discusses the California authorities and others.

The Colorado court in the recent case of *Kalamath Investment Co. v. Asphalt Paving Co.*, —— Colo. ——, 384 P.2d 938, held that a claimant at all times has the burden of proving its right to lien.

We recognize that construction work today utilizes vastly more equipment than when the Colorado lien law was enacted. It is also common knowledge that today machinery and equipment are often rented by contractors from other persons. However, there are factors which are for the consideration of those in the legislative branch. We must take the law and decisions of Colorado as we find them, and as they have been applied to similar situations.

We therefore hold that the trial court was correct in its view that the assigned claim could not serve as a basis for a lien, and there was no privity to support an in personam action against appellees other than The Maryland Casualty Company. We affirm the summary judgments and the granting of motions of all parties except The Maryland Casualty Company.

The Maryland Casualty Company is in a different position as to the in personam judgment sought against it under the assigned claim. As to this matter, the complaint seeks the judgment independently of any claim of lien and upon a performance bond executed by this appellee as surety for the prime contractor. The record does not contain a copy of the bond and its conditions are not otherwise stated. The determination of this claim on motion was not proper. The standards or requirements discussed above which are necessary to establish a lien do not prevail in actions on bonds, as the wording of the particular bond must of course determine its conditions.

It may be broader or more restrictive than the lien statutes which may be concerned in the same action. These differences are demonstrated in actions under the Miller Act. We are aware of the effect of the companion case which is now pending in the District Court. The record here shows also that the assignor of this claim, The Harrison Engineering & Construction Corporation, has the same officers, directors and stockholders as does appellant. It also shows that the claim is for equipment furnished the joint venture in which appellant was a member. Nevertheless, there remains the question as to the existence of the bonds alleged, their conditions, and related questions of fact. This claim is advanced by appellant individually and not on behalf of the joint venture; thus the matter of indispensable parties is not involved. The trial court was in error in granting the motion of The Maryland Casualty Company to dismiss.

REVERSED as to the granting of the motion to dismiss of The Maryland Casualty Company insofar as it relates to the claim assigned from The Harrison Engineering & Construction Corp[redacted]ion.

AFFIRMED as to all other motions granted and dispositions made by the trial court, including the granting of the motion to dismiss of The Maryland Casualty Company insofar as it relates to the claim asserted under Subcontract 581.